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No. 97-1396

In the

Supreme Court of the United States

October Term, 1997

VICKY M. LOPEZ, et al.,
Appellants,

v.

MONTEREY COUNTY, CALIFORNIA,
STATE OF CALIFORNIA
Appellees,

and

WENDY DUFFY,
Intervenor-Appellee.

On Appeal from the United States District Court for the Northern District of California

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE, STATE OF CALIFORNIA

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QUESTION PRESENTED

1. Whether the severe preclearance penalty of the Voting Rights Act, expressly imposed upon those states for political subdivisions identified by the Act's coverage formulae, may be extended to restrain a noncovered state which includes within its borders a covered political subdivision.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of appellee, the State of California. All parties have consented to the filing of this brief. The letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation[1] is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has adopted policies promoting the integrity of the electoral process. To that end, Pacific Legal Foundation is submitting this brief to provide an additional viewpoint with respect to the issues presented. PLF attorneys filed a brief in the earlier incarnation of this lawsuit, *Lopez v. Monterey County, California*, 519 U.S. 9, 117 S. Ct. 340 (1996), and participated in numerous other cases in the voting rights context before this Court including *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996); *Shaw v. Hunt*, 577 U.S. 899, 116 S. Ct. 1894 (1996); *United States v. Hays*, 515 U.S. 900 (1995); *Miller v. Johnson*, 515 U.S. 900 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); and *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419 (1991).

PLF believes that the significance of this case reaches beyond its limited facts because it addresses a fundamental question of law that goes to the heart of how the Constitution allocates power between the federal government and the states. Amicus seeks to augment the arguments in the parties' briefs regarding the proper understanding of the federalist system

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

established by the Constitution. PLF believes that the extraordinarily intrusive provisions of the Voting Rights Act must be construed narrowly to avoid unnecessarily treading on state sovereignty. In this case, the State of California has never been accused of engaging in discriminatory voting practices, covert or otherwise. Therefore, the federal government must not impose on California the intrusive penalties of the Act enacted to prevent further discrimination by those jurisdictions that *have* infringed upon citizens' right to vote. PLF believes that its public policy perspective and litigation experience dealing with federalism and the Constitution's enumeration of powers will provide this Court with a broader policy viewpoint than that presented by the parties and believes that its broader viewpoint will aid this Court in the resolution of this case.

OPINION BELOW

The December 19, 1997, opinion of the three-judge District Court in *Lopez v. Monterey County, California*, is not reported. The decision is included in the Jurisdictional Statement Appendix (JSA) at 1-12.

STATEMENT OF THE CASE

Prior to 1968, Monterey County, California (County), had two Municipal and seven Justice Court districts. *Lopez*, 117 S. Ct. at 343. Between 1968 and 1983, those districts were consolidated to provide for one Municipal Court district with judges elected at-large from the entire county. *Id.* at 344. The consolidation ordinances were subject to review under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and, in 1991, Latino residents (led by Vicky Lopez) of the County filed a Section 5 enforcement action seeking declaratory and injunctive relief

requiring the County to seek preclearance of the ordinances before enforcing them further. *Lopez*, 117 S. Ct. at 345.

On March 31, 1993, the United States District Court for the Northern District of California (three-judge panel) found that the ordinances did require preclearance and that the ordinances could not be enforced without preclearance. *Id.* at 345. In response to the court's order, the County sought after-the-fact preclearance in the United States District Court for the District of Columbia. *Id.* The County then stipulated that the consolidations ordinance did deny the right to vote to Latinos due to the retrogressive effect several of these ordinances had on Latino voting strength in Monterey County. *Id.*

Monterey County and Lopez came up with two plans for the election of Municipal Court judges, both of which required subdividing the County into judicial election districts. *Id.* However, these plans conflicted with Article VI, Section 16(b),[2] of the California Constitution by removing the linkage between a judge's electoral and jurisdictional bases. *Id.* Nonetheless, the parties asked the court to authorize the County to adopt the plan and, upon such authorization, the County said it would seek preclearance. *Id.* The State of California intervened and objected to the issuance of an order authorizing the plan. *Id.* at 346. The District Court did not approve the plan because it was not satisfied that a plan necessarily had to conflict with the California Constitution to comply with the Voting Rights Act. *Id.*

In a hearing to show cause why it kept submitting plans that create election districts that violate Article VI, Section 16(b), of the California Constitution, the County explained it could not submit a plan for preclearance that does not conflict with at least one state law and still comply with the Voting Rights Act. *Id.*

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[2] In pertinent part, Article VI, Section 16(b), of the California Constitution states: "Judges of other [nonappellate] courts shall be elected in their counties or districts at general elections."

at 345-46. Thereafter, the court enjoined Monterey County from holding elections for Municipal Court judges pending adoption and preclearance of a plan for their election. *Id.* at 346. The court ordered the County to take the necessary steps to obtain changes in existing state law and county ordinances to effectuate such a plan. *Id.* Lopez and the County then asked the court to allow elections to take place under one of the subdistricting plans or to authorize the County to implement a plan which would include districts that split cities. *Id.* at 346. A plan splitting cities would violate Article VI, Section 5(a), of the California Constitution.

The court implemented the four-district plan as an emergency, interim plan, with the restriction that the terms served by the judges elected pursuant to that plan shall expire on January 1, 1997. *Id.* at 346. The special election occurred on June 6, 1995. *Id.* Subsequently, this Court decided *Miller v. Johnson*, 515 U.S. 900, which the District Court correctly found cast serious doubt on the validity of the District Court's interim plan. *Id.* *Miller*, a racial gerrymandering case relating to Georgia's congressional districts, raised substantial doubt that legislative division of election districts based predominantly on race can withstand constitutional scrutiny. *Id.* at 911-12. Given this intervening clarification of the law, the District Court issued a new order on November 1, 1995. *Lopez*, 117 S. Ct. at 346. The new order rescinded the interim plan and held that judges will be elected in 1996 by the countywide at-large system in place before the litigation commenced. *Id.* The State of California joined the litigation as an indispensable party on the basis of its argument that the County was only administering a *state* statute and, therefore, the failure to preclear the consolidation ordinances is of no significance. *Id.* Lopez appealed the decision rescinding the emergency interim plan to this Court.

This Court issued its decision on November 6, 1996, holding that the County was required to preclear the ordinances

at the time those ordinances were enacted. *Id.* at 348. However, the Court did not finally dispose of the case. This Court expressly left several issues for the District Court to consider on remand: (1) whether intervening changes in California law converted the county's judicial election scheme into a state plan that does not need preclearance; (2) whether the complaint, originally filed in 1991 challenging consolidation ordinances enacted from 1968-83, was barred by laches; (3) whether it was constitutionally improper to designate Monterey County a covered jurisdiction under Section 5; and (4) whether the consolidation ordinances altered a voting "standard, practice, or procedure" subject to Section 5 preclearance.[3] *Id.* at 347. Consequently, the state moved to dismiss the Plaintiffs' complaint on the grounds identified by this Court as appropriate for remand and to vacate the District Court's order extending the terms of incumbent judges. The subject of the current appeal is the District Court's ruling regarding the state's first contention.

California does not discriminate against minorities in its conduct of elections. According to federal formulas contained in the Voting Rights Act, California never discriminated against minorities in its conduct of elections.[4] However, due to a combination of low voter turnout and high minority population present together in a single election, the federal government deemed 4 of California's 58 counties, including Monterey County, to have discriminated.[5] They therefore became covered

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[3] Neither the Attorney General nor the District Court for the District of Columbia has made any findings regarding the alleged retrogressive effect of the consolidation ordinances. *Lopez*, 117 S. Ct. at 347.

[4] Coverage is determined by Section 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b(b).

[5] Monterey County became subject to coverage in 1970, by failing the mechanical application of the Section 5 coverage standards: (1) on

(continued...)

jurisdictions subject to federal oversight of electoral changes. The State of California, itself, however, continued to regulate its own elections and the qualifications of its officers as is its fundamental, sovereign duty.

The California Constitution contains several provisions relating to judicial elections: "Each county shall be divided into municipal court districts as provided by statute." Cal. Const. Art. VI, § 5(a). "The Legislature shall provide for the organization and prescribe the jurisdiction of municipal courts." Cal. Const. Art. VI, § 5(c).[6] "Judges of other [nonappellate] courts shall be elected in their counties or districts at general elections." Cal. Const. Art. VI, § 16(b). State statutes flesh out the judicial

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[5] (...continued)
November 1, 1968, the California Constitution still included a statewide literacy test for voting (which had been discontinued by August, 1970) and (2) the Census Bureau determined that fewer than 50% of the voting age residents in the county had voted in the November, 1968, presidential election. *See* 42 U.S.C. § 1973b(b), 35 C.F.R. Part 51 (Appendix); 35 Fed. Reg. 12354 (July 24, 1980); 36 Fed. Reg. (No. 60) 5809 (March 27, 1971). In 1968, Monterey County had within its borders a large and active military base, Fort Ord Army Base, most of whose residents would not be expected to vote within Monterey County. *See Carrington v. Rash*, 380 U.S. 89, 91 n.3 (1965). Monterey County also housed the Naval Post-Graduate School. Moreover, Soledad State Prison was and is located in Monterey County. Under California law, the thousands of inmates could not vote. Cal. Const. Art. II, § 4. The combined populations of the military outposts and the prison accounted for almost one-sixth of the County's total population. Appellee State's Brief on the Merits in *Lopez v. Monterey County, California* (No. 95-1201), at 1-2. With a large proportion of this population not voting, the turnout for the 1968 elections fell below 50%, thus triggering the coverage provisions of the Voting Rights Act.

[6] Article VI, Section 5, of the California Constitution was adopted by initiative constitutional amendment in 1995.

election scheme. For Monterey County, the state Legislature enacted the following statute:

> There is [in] the Court of Monterey, on and after the effective date of this section, a single municipal court district which embraces the former Salinas Judicial District, Monterey Peninsula Judicial District, and North Monterey County Judicial District. This article applies to the municipal court established within the judicial district which shall be known as the Monterey County Judicial Court.

Cal. Gov't Code § 73560 (as amended in 1979). As the District Court below summarized, "by the amendment to section 73560 in 1979, the State clearly dictated that Monterey County would have a single municipal court district." JSA at 7. Monterey County by then had only the single Municipal Court district and two Justice Court Districts. In 1983, the state amended Government Code § 73562 to increase the number of Monterey Municipal Court judges from seven to nine, contingent upon the consolidation of the single Municipal Court district with the Justice Court districts. *Id.* The State submitted the 1983 amendment to the United States Attorney General for preclearance, which was granted. *Id.* Another amendment to this Government Code § 73560 in 1989 acknowledged the consolidation had occurred, noting that "the Monterey County Municipal Court District . . . encompasses the entire County of Monterey. JSA at 8. Finally, due to a 1995 constitutional provision requiring Municipal Court districts to have a minimum population of 40,000, the two Justice Courts would necessarily have become part of the Monterey County Municipal Court District. *Id.* (citing Cal. Const. Art. VI, § 5(a)).

Relying on *Young v. Fordice*, 117 S. Ct. 1228 (1997), the District Court held that a covered jurisdiction under Section 5 of the Voting Rights Act need not seek preclearance unless it exercises some policy choice and discretion. Because Monterey County lacks the discretion to choose a voting plan that does not

involve a countywide judicial election district, the Plaintiffs did not state a claim for relief and their complaint was dismissed. *Id.* at 8-9. The District Court issued its judgment on December 19, 1997. The Plaintiffs filed their notice of appeal on December 24, 1997. The State of California filed a motion to affirm the judgment on March 27, 1998. This Court noted probable jurisdiction on March 6, 1998.

SUMMARY OF ARGUMENT

California, a sovereign state, must determine the qualifications of its own officers and the structure of its own government. California may, in furtherance of its decisions regarding the best qualifications and structure, impose state restrictions on subordinate political entities. The federal government has never found that California's state election laws discriminate against minorities, even when those laws are directed toward particular counties. No county, a mere political subdivision of the state, may declare itself exempt from these nondiscriminatory provisions.

Given the fundamental principles of federalism, micromanagement by the federal government in the absence of discriminatory conduct by the state infringes on the state sovereignty as protected by the Tenth Amendment to the United States Constitution. Because the court below determined that a state statute and precleared county ordinance are the sole legal authority governing Monterey County's judicial elections, it correctly held that Section 5 of the Voting Rights Act does not apply in this case. The judgment below should be affirmed.

ARGUMENT

I
EXPANDING THE BREADTH OF SECTION 5 PRECLEARANCE PROCEEDINGS TO COVER AN "UNCOVERED" STATE VIOLATES THE TENTH AMENDMENT

Traditional state powers, as protected by the Tenth Amendment to the United States Constitution,[7] are threatened when the federal government declares that a state judicial election practice violates the Voting Rights Act. Established notions of federalism grant states the authority "to determine the qualifications of their most important government officials." *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991). Under the United States Constitution, the states reserve the power to regulate elections and decide how state officials are chosen. *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973). The Tenth Amendment memorializes the dual sovereign structure embedded within the structure of the Constitution.

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, *each protected from incursion by the other*. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own

[7] The Tenth Amendment to the United States Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

> set of mutual rights and obligations to the people who sustain it and are governed by it.

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (emphasis added). An assertion that Congress has violated the Tenth Amendment is more aptly characterized as an assertion that Congress has attempted to regulate the states in a way that is contrary to the federalism structure. "The Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York v. United States*, 505 U.S. 144, 157 (1992).

The constitutional requirement to conform to the federalism structure provides substantive protections to individual liberty. *See generally, Gregory*, 501 U.S. at 458-59. Courts should not compel states to adopt remedial measures that contravene state laws codifying important state interests. *Id.* at 457, 472-73; *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900); *Boyd v. Nebraska, ex rel. Thayer*, 143 U.S. 135, 161 (1892); *Magnolia Bar Association v. Lee*, 793 F. Supp. 1386, 1417 (S.D. Miss. 1992). The theoretical basis for the assertion that state interests may overcome federal remedial measures originates in a long line of Supreme Court cases recognizing the right of a state to assert its sovereignty by defining who will, and who will not, exercise governmental authority. *Gregory*, 501 U.S. at 457, 472-73 (Under Article V of the United States Constitution, the people of Missouri have the perogative to determine whether judges must retire by a certain age); *Taylor*, 178 U.S. at 570-71 ("It is obviously essential to the independence of the states, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive and free from external interference, except so far as plainly provided by the Constitution of the United States."); *Boyd*, 143 U.S. at 161 ("Each state has the power to prescribe the qualifications of its officers, and the manner in which they shall be chosen."). Wholesale changes or

intrusive alterations of the nature and operation of a state's judicial branch violate the principles of federalism ensconced in the Tenth Amendment to the United States Constitution. This Court has, in just the past few years, more fully explored the scope of this constitutional provision.

In *Gregory v. Ashcroft*, 501 U.S. 452, this Court read the Age Discrimination in Employment Act narrowly to avoid a construction that would have overturned Missouri's mandatory retirement age for state judges. "Through the structure of its government," the Court commented, "and the character of those who exercise government authority, a State defines itself as a sovereign." *Id.* at 460. Thus, Missouri's decision to retire judges at age 70 was the "prerogative" of "citizens of a sovereign State." *Id.* at 473. The federal government cannot tell the states to retain judges over the age of 70, because that command would destroy the ability of state citizens to "choose their own officers for governmental administration." *Duncan v. McCall*, 139 U.S. 449, 461 (1891). The federalist structure preserves freedom by separating the federal government from state governments. The ability to retain that freedom is completely obliterated, however, if the federal government can simply displace a state's own management of state affairs with federal laws.

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory, 501 U.S. at 458.

In *New York v. United States*, 505 U.S. 144, this Court struck down a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b, because the provision commanded states either to enact laws regulating the disposal of low-level radioactive waste or to take title to all low-level radioactive waste generated within their borders. The Court distinguished firmly between congressional power "to pass laws requiring or prohibiting certain acts" by private parties and congressional attempts "to compel the States to require or prohibit those acts." *Id.* at 166. The former is consistent with the Supremacy Clause, while the latter destroys the accountability of state officials to their electorate. *Id.* at 178-79. Congress, therefore, could not "simply . . . direct the States to provide for the disposal of the radioactive waste generated within their borders." *Id.* at 188.

This Court expanded *New York* in *Printz v. United States*, 117 S. Ct. 2365, 2368 (1997), a Tenth Amendment challenge to the Brady Act, an amendment to the Handgun Control Act of 1968, regulating the sale of firearms. In that case, the plaintiff sheriffs argued that, as state employees, with their primary obligation and oath to fulfill their state law responsibilities, Congress could not force them to carry out the federal requirements of conducting background checks on gun purchasers. *Id.* at 2369-70. This Court held:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.

Id. at 2384. The Court was not persuaded by the government's arguments that directing the conduct of state officers was less offensive to federalism than directing the conduct of state legislatures, stating: "To say that the Federal Government cannot control the State, but can control all of its officers, is to say nothing of significance." *Id.* at 2382.

Despite the restrictions placed on the federal government regarding its ability to mandate states to run their own governments in any particular way, this Court has authorized some incursions into state sovereignty by upholding the constitutionality of Section 5 of the Voting Rights Act. As stated in its preamble, the Act was intended "[t]o enforce the fifteenth amendment to the Constitution of the United States." *See Allen v. State Board of Elections*, 393 U.S. 544, 588 (1969) (Harlan, J., concurring in part and dissenting in part). Pursuant to this constitutional power, the statute was aimed at discriminatory voting procedures which continued to deprive blacks of access to the ballot, such as literacy tests and grandfather clauses. *Shaw v. Reno*, 509 U.S. 630, 639 (1993). *See also Young v. Fordice*, 117 S. Ct. at 1232 (noting application of Section 5 to states with "a specified history of voting discrimination"). Then Attorney General Katzenbach repeatedly emphasized that the sole ambition of the Act was getting people registered. *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 145 (1978) (Powell, J., concurring in part and concurring in the judgment). Although the Act constituted an "uncommon exercise of congressional power," *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966), and a "substantial departure . . . from ordinary concepts of our federal system," *Hearings on S. 407, et al., Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 94th Cong., 1st Sess. 536 (1975) (testimony of J. Stanley Pottinger), its *limited* scope made it proper legislation pursuant to the Fifteenth Amendment. *See, e.g., City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980); *Katzenbach*, 383 U.S. 301.

Members of this Court have long recognized that Section 5, even with its plain language construction (in contrast with the plaintiffs and Justice Department's broad interpretation), mandates severe intrusion by the federal government into state electoral autonomy. Justice Black wrote:

> I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces.

South Carolina v. Katzenbach, 383 U.S. at 359-60 (Black, J., concurring in part and dissenting in part). Even though the majority opinion in *Katzenbach*, 383 U.S. at 335, upheld Section 5 as necessary and constitutional, the limitations on Section 5's intrusiveness were recognized in *Miller v. Johnson*, 515 U.S. at 927: "As we recalled in *Katzenbach* itself, Congress' exercise of its Fifteenth Amendment authority even when otherwise proper still must be consistent 'with the letter and spirit of the constitution.'" *Katzenbach*, 383 U.S. at 326, *cited in Miller*, 515 U.S. at 927. This Court has therefore forbidden an expansive reading of Section 5 precisely because of its obvious and immediate impact on state sovereignty.

A state's sovereignty, consistent with the Tenth Amendment, must be recognized in determining the extent to which federal courts and the Justice Department will be permitted to restructure state election laws enacted without discrimination. Federalism concerns consistent with the Tenth Amendment have been formalized by the rule that a statute will not be construed to undercut state authority unless there is a showing of the "unambiguous intent" of Congress to effect the purpose. *New York v. United States*, 505 U.S. at 171. "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that

the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory*, 501 U.S. at 461 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)). As construed in *Beer v. United States*, 425 U.S. 130 (1976) (announcing retrogression principle), Section 5 is indisputably a serious intrusion into the normal federal-state balance of authority. *See, e.g., United States v. Board of Commissioners*, 435 U.S. at 141 (Stevens, J., dissenting). To ignore the State of California's affirmative policy choices imposed on its counties through constitutional provisions and statutory law elevates the federal government's desire to oversee county elections over California's sovereign interest in promoting uniformity in the judicial elections of all 58 counties.

In *Chisom v. Roemer*, Justice Scalia wrote in dissent that "Section 2 of the Voting Rights Act of 1965 is not some all-purpose weapon for well-intentioned judges to wield as they please in the battle against discrimination." *Chisom*, 501 U.S. at 404 (Scalia, J., dissenting).[8] The same sentiment is even more true for Section 5.[9] The burden on California urged by the Plaintiffs in this case would severly strain the bounds of federalism by potentially requireing a soverign state with no history of discrimination to amend its own state constitution to accommodate the federal government's view of the perferred method of conducting county judicial elections. The circumstances of this case simply cannot justify such an intrusive burden. The decision of the District Court should be affirmed.

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[8] Section 2 is codified at 42 U.S.C. § 1973(a).

[9] This Court has twice found "insupportable" the Department of Justice's heavy-handed application of Section 5 to require states to maximize the number of minority districts. *Shaw v. Hunt*, 116 S. Ct. at 1904 (citing *Miller*, 515 U.S. at 924).

II

THE STATE OF CALIFORNIA HAS SUBSTANTIAL INTERESTS IN DETERMINING THE STRUCTURE OF INFERIOR COURTS

Because states have a substantial interest in the election laws that apply to state officers, federal courts should not compel the states to adopt remedial measures that contravene the policy choices reflected in those state laws. *See, e.g., Magnolia Bar Association*, 793 F. Supp. at 1417; *Taylor v. Beckham*, 178 U.S. at 570-71; *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. at 161.[10] In *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (*en banc*), *cert. denied*, 115 S. Ct. 1795 (1995), the Eleventh Circuit noted that implicit in this Court's plurality opinion in *Holder v. Hall*, 512 U.S. 874 (1994), was the idea that the Voting Rights Act could not constitutionally authorize federal courts to order the

[10] This issue was raised, but not resolved in at least one other similar instance. The settlement of *White v. Alabama*, 867 F. Supp. 1519 (M.D. Ala. 1994), *vacated*, 74 F.3d 1058 (11th Cir. 1996), which was approved by a federal District Court judge, expressly contradicted the Alabama Constitution by requiring an appointment process where the constitution mandates the election of judges. Specifically, Alabama's constitution provides for the election of all judges (Ala. Const. Amend 328, § 6.13) and grants the exclusive power to fill vacancies to the governor. Ala. Const. Amend. 328, § 6.14. State law requires that all qualified candidates be allowed to appear on the general election ballot. Ala. Code § 17-7-1 (1995). The legislature is vested with the power to decide the number of judges and whether to fund additional seats. *White*, 867 F. Supp. at 1545. Thus, because the settlement provided its own appointment process, it expressly violated state law. *White*, 74 F.3d at 1075 n. 54. The Eleventh Circuit did not reach this issue because it vacated the District Court's adoption of the settlement on other grounds. Taylor, *The Settlement of White v. Alabama: Judicial Intervention Into Alabama's At-Large Judicial Election Scheme*, 47 Ala. L. Rev. 901, 914 (1996).

composition of state governments. *Nipper*, 39 F.3d at 1532. The court of appeals quoted *Gregory v. Ashcroft*, which recognized that "the State's power to define the qualifications of their officeholders has force even as against the proscriptions of the Fourteenth Amendment" and that "the Fourteenth Amendment does not override all principles of federalism." *Gregory*, 501 U.S. at 469. States that choose their judges by popular election have decided that the "actual or possible threats to the impartiality and integrity of the judicial profession are outweighed by the popular accountability of the judiciary." P. Dubois, *From Ballot to Bench: Judicial Elections and the Quest for Accountability* 29 (1980), *cited in* Izatt, *The Voting Rights Act and the Judicial Elections: Accommodating the Interests of States Without Compromising the Goals of the Act*, 1996 U. Ill. L. Rev. 229, 243 (1996).

In *League of United Latin American Citizens, Council No. 4434 v. Clements (LULAC)*, 999 F.2d 831, 868-69 (5th Cir. 1993), the Fifth Circuit held that linking jurisdictional and electoral bases of trial courts

> advances the state's substantial interest in judicial effectiveness. Trial judges are elected by a broad range of local citizens, rather than by a narrow constituency. This electoral scheme balances accountability and judicial independence.
>
> By making coterminous the electoral and jurisdictional bases of trial courts, Texas advances the effectiveness of its courts by balancing the virtues of accountability with the need for independence. The state attempts to maintain the fact and appearance of judicial fairness that are central to the judicial task, in part, by insuring that judges remain accountable to the range of people within their jurisdiction. A broad base diminishes the semblance of bias and favoritism towards the parochial interests of a narrow constituency.

> Appearances are critical because "the very perception of impropriety and unfairness undermines the moral authority of the courts." The fear of mixing ward politics and state trial courts of general jurisdiction is widely held. It is not surprising then that states that elect trial judges overwhelmingly share this structure and electoral scheme. The systemic incentives of subdistricting are those of ward politics, and would "diminish the appearance if not fact of its judicial independence—a core element of a judicial office."

The Fifth Circuit in *LULAC* also held that this Court's decision in *Gregory* requires that the State's interest, as described above, be granted substantial weight because "the authority of the people of the States to determine the qualifications of their most important government officials . . . lies at the heart of representative government." *Id.* at 872.[11] Thus, the Fifth Circuit reasoned:

> If that interest is compelling, the people of Texas have *at least* a substantial interest in defining the structure and qualifications of their judiciary. Indeed, Texas' Attorney General has submitted to this court that linkage is a "fundamental right" that "serves [a] compelling interest" of the State of Texas. Linking electoral and jurisdictional bases is a key component of the effort to define the office of district judge. That Texas' interest in the linkage of electoral and jurisdictional bases is substantial cannot then be gainsaid.

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[11] *See Bates v. Jones*, 131 F.3d 843, 859 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1302 (1998) (Rymer, J., concurring) (identifying a state's interest in the structure of its government as one of the "strongest possible interests that the citizens of California could have, because it lies at the core of the state's constitutional authority").

LULAC, 999 F.2d at 872. Courts recognized the legitimacy and substance of linking electoral bases and courts' jurisdiction in Florida and Alabama. *See Nipper v. Chiles*, 795 F. Supp. at 1548; *Southern Christian Leadership Conference of Alabama v. Evans*, 785 F. Supp. 1469, 1478 (M.D. Ala. 1992). The legislative bodies of the 25 states that employ districtwide elections to elect their principal trial court judges have obviously come to the same conclusion. *See LULAC*, 999 F.2d at 872 and n.33. Thus, the overwhelming preservation of linkage in states that elect their trial court judges demonstrates that districtwide elections are integral to the judicial office and not simply another electoral alternative.

> The decision to make jurisdiction and electoral bases coterminous is more than a decision about how to elect state judges. It is a decision of what *constitutes* a state court judge. Such a decision is as much a decision about the structure of the judicial office as the office's explicit qualifications such as bar membership or the age of judges. The collective voice of generations by their unswerving adherence to the principle of linkage through times of extraordinary growth and change speaks to us with power. Tradition, of course, does not make right of wrong, but we must be cautious when asked to embrace a new revelation that right has so long been wrong. There is no evidence that linkage was created and consistently maintained to stifle minority votes. Tradition speaks to us about its defining role—imparting its deep running sense that this is what judging is about.

LULAC, 999 F.2d at 872 (emphasis in original).

Like Texas, Florida, and Alabama (among others) California has a substantial sovereign interest in having trial judges remain accountable to all voters in their district. Regardless of the race or residency of particular litigants, judges

make choices that affect all county residents and California's choice that they must therefore answer to all county voters at the ballot box is entitled to tremendous deference by the federal court.

CONCLUSION

As a sovereign state, California's constitution and statutes reflect policy choices as to the qualifications of state judges and structure of the state judiciary. These policy choices represent substantial interests that Congress may override with only the most explicit intent for only the most compelling reasons. Neither is present in this case. Federalism requires that the nondiscriminatory state laws at issue in this case remain free from federal oversight.

For the reasons expressed above, the decision of the District Court for the Northern District of California should be affirmed.

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Respectfully submitted,

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